Cell Agricultural Manufacturing Co. *and* Sheet Metal Workers International Association, Local 10, AFL–CIO. Cases 18–CA–11758 and 18–CA–11800

July 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 25, 1992, Administrative Law Judge William J. Pannier issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

Since January 1990, the Respondent has operated an ''assembly plant'' and a ''rubber plant'' for the manufacture of potato harvesters and planters. Prior to 1990, N.F.D. and N.F.D., Inc. (Rubber Division) operated the two plants and the employees were represented in an employerwide two-plant bargaining unit by a local of the Teamsters. When the Respondent took over operations, in 1990, however, the employees became unrepresented. Thereafter, assembly plant employees became dissatisfied over the Respondent's failure to grant wage increases and insurance coverage. Employees met with agents of Sheet Metal Workers International Association, Local 10 (the Union) on April 22, 1991. Subsequently a majority of the 33 assembly plant employees signed authorization cards.

The judge found, and we agree, that the Respondent, through its vice president, Gary Cell, violated Section 8(a)(3) and (1) of the Act by laying off all its assembly plant employees on April 24, 1991, 2 days after the union meeting, and thereafter by refusing to reinstate three of them.[3] Further, we agree with the judge that the Respondent, through Vice President Gary Cell, violated Section 8(a)(1) by granting wage increases selectively to eight assembly plant employees in late April.

The judge found that the Union had had a majority of the 33 employees in the assembly plant bargaining unit.[4] In view of the nature and extent of the violations, the judge concluded that the possibility of erasing the effects of the Respondent's unlawful acts by traditional remedies was slight. He recommended issuance of a *Gissel*[5] bargaining order.

We agree with the judge. We further find that the precipitate, unlawful mass layoff of the entire bargaining unit, the refusal to reinstate the three employees, and the discriminatory grant of benefits to discourage union support constituted ''hallmark'' violations. These ''hallmark'' violations, directly and immediately affecting every member of the unit in the case of the layoff, particularly require a remedial bargaining order. *Airtex*, 308 NLRB 1135 (1992) (*Airtex*). *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991). See also *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980).

In *Airtex* we included as ''hallmark'' violations such employer misconduct as threats of plant closure or loss of employment, discriminatory layoffs, and changes in working conditions. Such conduct by the highest level of management, as here, ''justifies a finding without extensive explication that it [the conduct] is likely to have a lasting inhibitive effect on a substantial percentage of the work force.'' *Airtex*, supra at 1136, quoting from *NLRB v. Jamaica Towing*, supra, 632 F.2d at 213. Similarly in *Eddyleon Chocolate Co.*, supra, we stated that plant closure, layoff threats, and discriminatory discharges are more likely to destroy election conditions for a longer period of time than other unfair practices because they tend to reinforce employees' fears that they will lose employment if union activity persists. Id. at 891. See also *Jamaica Towing* at 213.[6]

The coercive impact of Respondent Vice President Gary Cell's announcement and implementation of a mass layoff can hardly be gainsaid. Its impact is in-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,B, par. 3, of his decision, the judge relied on the fact that the Respondent had expressed concern about the rumors of possible unionization as evidence of union animus. In finding union animus, we do not rely on Gary Cell's expression of concern as evidence of animus. This finding does not affect our decision to affirm the judge's finding of animus based on the other factors cited.

[2] In adopting the judge's recommendation to impose a bargaining order, we do not rely on his conclusion that one of the effects of the unfair labor practices is to ''create a reputation for Respondent as an anti-union employer . . . .'' (JD sec. III,E.)

[3] In affirming the judge's finding that the layoffs were unlawful we rely additionally on *Shattuck Denn Mining Corp.*, 362 F.2d 466 (9th Cir. 1966), which holds that in determining actual motive the trier of fact may infer motive from the total circumstances proved. If he finds that the stated motive is false (in this case the work slowdown) he may infer that there is another motive and that it is one the employer wishes to conceal.

[4] The judge found, and we agree, that a single-plant unit consisting of the Respondent's assembly plant employees is an appropriate unit.

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[6] The court in *Jamaica Towing* included as ''hallmark'' violations such employer misconduct as the closing of a plant or threats of plant closure or loss of employment, the discharge of union adherents, and the grant of benefits to employees. It characterized the actual closure of a plant or discharge of employees as ''complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.'' Id. at 213. The court specifically noted that repeated 8(a)(3) violations will rarely be misinterpreted and their coercive effect not readily undone because of the length of time involved in the litigation that might lead to restoration of employment.

creased by virtue of its precipitate and reflexive nature 2 days after employees met with union representatives and signed authorization cards. *Astro Printing Services*, 300 NLRB 1028 (1990) (unfair labor practices commenced on the day the union demanded recognition). The effect of such unlawful practices is heightened by the special stature of Gary Cell, a vice president and owner of the Respondent and son of its president. *Vemco, Inc*., 304 NLRB 911 (1991). Cell insisted that as a correlation of rehire each employee accept the current terms of employment. Thus the layoff and recall served abrupt, graphic, and indelible notice on all employees that the Respondent controlled their employment, to the exclusion of any outside agency that might seek an improvement in their conditions of employment. The mass layoff ensured that the coercive message was communicated to all the employees. Also see *Vernon Devices*, 215 NLRB 475 (1974) (mass discharge for 1 hour demonstrating lengths to which employer would go cannot be cured by repayment of the minimal wages lost or notice posting). Cf. *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 149 (3d Cir. 1979).

The unlawful and discriminatory discharges of employees Witte, Hackler, and Thomas, all union adherents, none of whom would have been terminated if not for the unlawful layoff, were highly coercive and unlikely to be forgotten.[7] By decimating the unit in pursuit of its unlawful goal the Respondent again demonstrated its economic power over its employees. The likely result of such action is to reinforce the employees' fear that they would lose employment if they persisted in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987).

The Respondent's grant of benefits—i.e., the wage increases—is yet another violation that will have a lasting impact. As the Supreme Court has noted, ''[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow.'' *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). Additionally, the Respondent, through its misconduct, remedied the very problem that had led employees to seek union representation in the first place and thereby undermined the union campaign. As noted by the Board in *Koons Ford*, supra, unlawful wage increases have a particularly long lasting effect because the Board's traditional remedies do not require that an employer rescind its wage increase. See also *Tipton-Electric Co*., 242 NLRB 202 (1979), enfd. 621 F.2d 890, 899 (8th Cir. 1980) (Employer's grant of benefits was a calculated application of the carrot and the stick to condition employee response to the union that could not be cured ''by simply ordering [respondents] to mend their ways'' and to post a notice. Court found the damage had been done and the only fair way to guarantee employee rights was a bargaining order to reestablish conditions that existed before the election).

Evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order. *Q-1 Motor Express*, 308 NLRB 1267 (1992). See, e.g., *Salvation Army Residence*, 293 NLRB 944, 946 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990) (bargaining order remained valid where new employees constituted 64 percent of the work force); *Action Auto Stores*, 298 NLRB 875 fn. 3 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991) (bargaining order remained valid where new employees constituted 75 percent of work force). Nevertheless, some courts have refused to enforce bargaining orders where the Board has not considered the impact of employee turnover. See *Avecor v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991), where the court held that before issuing a *Gissel* category II bargaining order, the Board must consider employee turnover. Further, we are told to examine the turnover that has occurred up to the time of new order. See also *NLRB v. Pace Oldsmobile*, 681 F.2d 99 (2d Cir. 1982); *M.P.C. Plating v. NLRB*, 912 F.2d 883 (6th Cir. 1990). But see *NLRB v. Balsam Village Management Co*., 792 F.2d 29 (2d Cir. 1986), cert. denied 479 U.S. 931 (1986), enfg. 273 NLRB 420 (1984) (8(a)(3) discharges are hallmark violations; the fact that there was 100-percent turnover in the unit is no defense because it was a direct and obvious product of the unlawful conduct).

If, however, employee turnover can be relevant in determining the appropriateness of a bargaining order, the burden must be on the employer to demonstrate why employee turnover should preclude the imposition of a bargaining order. If the General Counsel has established that an employer's unfair labor practices would tend to have a pervasive adverse influence on employees, the employer must demonstrate that a free and fair election could occur among current employees. Thus, in regard to new employees, the employer must establish that new employees are free from the coercive effects of the past unfair labor practices. Our experience teaches that new employees inevitably learn of an employer's past unlawful conduct particularly when employees who were the targets of an employer's antiunion campaign and/or the management officials who have committed the misconduct are still present. See *International Door*, 303 NLRB 582, 583 (1991). Thus the effects of serious hallmark violations,

[7] We note that in finding that Witte, Hackler, and Thomas were discharged in violation of Sec. 8(a)(3) and (1), the judge failed to cite *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the judge's analysis is fully consistent with the principles set forth in that case.

like those present here, are not easily erased.[8] We recognize that, in an 8(a)(3) case, the Board's traditional remedy includes reinstatement and backpay for the discriminatees. However, we are not persuaded that this remedy will necessarily assuage the concerns of the other employees who are now in the unit. Where, as here, the remedy comes only after long and arduous litigation, the other employees may well be reluctant to engage in union activity. As they view it, such activity led to a prolonged period of unemployment for the discriminatees, and they may not wish to risk a similar fate.[9]

Here, the Respondent has shown no more than that 18 new employees were hired after the unlawful layoffs, and that it generally experiences a turnover of two-thirds of its work force. In our judgment, the Respondent's evidence regarding employee turnover does not significantly weigh against imposing a bargaining order. (Indeed, were the Respondent law abiding, who is to say that turnover would not be substantially reduced?)

Thus, as found by the judge, we also conclude that a bargaining order is appropriate. We find that the lingering atmosphere of coercion resulting from the Respondent's unlawful behavior makes it impossible to hold a free and fair election. As the judge found, the effect of the Respondent's conduct cannot be erased by the passage of time or traditional remedies and thus, a *Gissel* bargaining order is required. See, e.g., *Koons Ford of Annapolis*, supra; *Crown Cork & Seal Co*., 308 NLRB 445 (1992); *Foster Electric*, 308 NLRB 1253 (1992); and *F. L. Smithe Machine Co*., 305 NLRB 1082 (1992). Also see *Tipton Electric*, 242 NLRB 202 (1979), enfd. 621 F.2d 890 (8th Cir. 1980), supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cell Agricultural Manufacturing Co., Braham, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[8] Contrary to the Respondent, we view the evidence that certain employees signed petitions declaring, in effect, that they did not want union representation without an election as bolstering, not weakening, the need for a bargaining order. Thus, subsequent to the Respondent's unfair labor practices, employees who previously had supported the Union began to retract their allegiance to the Union. That supports the conclusion that the Respondent's misconduct dissipated the Union's support among employees.

[9] In the instant case, although the original layoff was rescinded after a few days for most employees, there were three employees who were unlawfully not recalled.

Everett Rotenberry, for the General Counsel.
Steven C. Miller, of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER, Administrative Law Judge. I heard this case in Cambridge, Minnesota, on October 1 and 2, 1991.[1] On July 22, the Regional Director for Region 18 of the National Labor Relations Board (the Board), issued an order consolidating cases, amended and consolidated complaint and notice of hearing, consolidating the unfair labor practice charge in Case 18–CA–11758, filed on May 22 and amended on June 20, with the charge in Case 18–CA–11800, filed on June 20, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

At all times material, Cell Agricultural Manufacturing Company (Respondent) has been a Minnesota corporation, with an office and place of business in Braham, Minnesota, and has been engaged in the manufacture and nonretail sale and distribution of farm equipment. In the course and conduct of those business operations during calendar year 1990, Respondent sold and shipped products, goods, and materials valued in excess of $50,000 from its Braham facility directly to customers located outside the State of Minnesota and, furthermore, purchased and received at its Braham facility products, goods, and material valued in excess of $50,000 directly from points outside the State of Minnesota. Therefore, I conclude, as admitted in the amended and consolidated answer of Cell Agricultural Manufacturing Company, that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Sheet Metal Workers International Association, Local 10, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise stated, all dates occurred in 1991.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

There is virtually no dispute regarding most of the principal facts, as opposed to motivations and inferences to be drawn from those facts, underlying the complaint's allegations. Prior to 1990, N.F.D., Inc. and N.F.D., Inc. (Rubber Division) operated the essentially two plants—an assembly plant and a rubber plant—at Braham which Respondent has operated there since January 1990. At that location N.F.D., Inc. manufactured agricultural products, principally potato planters and harvesters. Respondent continues to manufacture those same products, with Gordon Cell serving as its president and with his son, Gary Allen Cell, serving as its vice president. Both are admitted statutory supervisors and agents of Respondent.

One material change did occur after Respondent commenced operations at Braham. Prior to 1990, all employees working there were represented in an employerwide, two-plant bargaining unit by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 970. For reasons unexplained in the record, the employees became and remained unrepresented from the time that Respondent commenced manufacturing agricultural machinery at Braham. That, however, did not mean that employees working there were satisfied with their employment terms. It is undisputed that there were ongoing complaints about some of them, particularly the absence of wage increases. In approximately April 1990, three employees, two of whom were Scott Allen Witte and Gary Hackler, met with Gordon Cell and discussed employee dissatisfaction concerning the absence of a procedure for employees to merit increases and concerning insurance coverage. That meeting did not resolve the dissatisfaction of at least some employees and, it is uncontradicted, Witte periodically questioned Welding Foreman Rodney Gross, an admitted statutory supervisor and agent of Respondent, about wage increases during early 1991.

In addition to commenting directly to Respondent's officials, employees began discussing the possibility of again becoming represented. Gary Cell admitted that he had been aware of those discussions among the employees. Eventually, Witte contacted the Union. On April 22, two of its agents met with a group of Respondent's employees in the parking lot of the Track Side, a local restaurant and bar. Included in that group was Roy Stromberg, Respondent's machine shop foreman until June 28 and an admitted statutory supervisor and agent of Respondent until that date. At that meeting, Stromberg and 17 employees signed cards authorizing the Union to be their bargaining agent. Five additional employees signed such cards over the course of the next 7 days.

Two days after the Track Side parking lot meeting, at lunchbreak on Wednesday, April 24, Gary Cell notified all assembly plant employees that they were being laid off and that any who desired continued employment with Respondent should file employment applications by Friday, April 26. In fact, leadman Rick Helmbrecht did so immediately and was hired back that same afternoon. Over the course of the next few days, almost all the other laid-off employees were rehired. However, Respondent refuses to rehire Witte, Hackler, and welder Alvin Thomas. Furthermore, some of the recalled employees were awarded wage increases of at least, and sometimes more than, 25 cents an hour. Four of those increases were effective retroactively to April 22.

The complaint alleges that the April 24 mass layoff, as well as the subsequent refusal to rehire Witte, Hackler, and Thomas, had been motivated by considerations that violated Section 8(a)(3) and (1) of the Act. Respondent argues that, prior to that date, assembly plant employees had been engaging in a slowdown, apparently protesting Respondent's unwillingness to grant wage increases. As a result, contends Respondent, it took advantage of a then-existing shortage of steel for manufacturing harvesters and laid off all assembly plant employees so that it could regain control in that plant and restore production to preslowdown levels. In addition, Respondent asserts that Witte, Hackler, and Thomas had each engaged in unsatisfactory conduct that legitimately warranted refusing to recall the three of them following the mass layoff. Aside from the mass layoff and refusal to recall Witte, Hackler, and Thomas, the complaint alleges that the post-April 24 wage increases violated Section 8(a)(1) of the Act, because they assertedly had been granted to discourage further employee support for the Union, an allegation denied by Respondent.

Because of the severity of the foregoing alleged unfair labor practices and because a majority of the assembly plant employees has signed authorization cards between April 22 and 29, the General Counsel contends that Respondent should be obliged, as part of the remedy, to bargain with the Union as the representative of employees working in the assembly plant, excluding, particularly, rubber plant employees. While not disputing that the Union obtained authorization cards from a numerical majority of the assembly plant employees by April 29, Respondent argues that Stromberg's support for the Union tainted at least some of those cards and deprives the Union of its numerical majority status. It further contends that a unit confined to the assembly plant is too narrow and, consistent with the unit's scope prior to 1990, that only an employerwide, two-plant unit can be appropriate at Braham. Finally, urges Respondent, because a substantial number, if not a majority, of all Braham employees signed petitions disavowing support for the Union, at least without an election, and because turnover is high in Respondent's employment complement, no bargaining order should be issued, in any event.

For the reasons set forth, post, I conclude that a preponderance of the evidence does establish that Respondent laid off the assembly plant employees on April 24 because of the union activity then in progress among them and, conversely, that the credible evidence supports neither Respondent's assertion that there had been a work slowdown by those employees, nor its companion assertion that it would have laid off those employees as a result of that slowdown even had there been no union activity by them. Moreover, Respondent effectively admits that it would have allowed Witte, Hackler, and Thomas to continue working for it had there been no mass layoff on April 24, and the credible evidence does not support any assertion that even one of those three employees engaged in misconduct that would have led to his layoff, absent a mass layoff caused by unlawful considerations. Furthermore, I conclude that there is no credible evidence that wage increases would have been granted to employees absent the existence of an organizing campaign and, accordingly, that a preponderance of the evidence shows that wage in-

creases were granted to employees in late April to discourage their support for the Union, by showing that representation was not needed to secure increases. Finally, I conclude that a single plant unit of assembly plant employees is appropriate and, further, that a bargaining order must be issued, allowing the Union to represent employees in that unit on the basis of its majority status as shown by signed authorization cards, because Respondent's unfair labor practices were so serious and pervasive that it cannot be said that there is even a slight chance of erasing their effects through traditional remedies and there is no realistic prospect of conducting a representation election in an atmosphere untainted by the effects of their commission.

B. *The Mass Layoff on April 24*

The evidence presented by the General Counsel establishes a prima facie case that the layoff on April 24 had been motivated by the assembly plant employees' union activity. The initial meeting between them and the Union's agents had occurred on April 22, 2 days before the mass layoff. On that same date, he admitted, Vice President of Operations Gary Cell had ''heard a rumor that some of the guys were going up to the Track Side to talk about a union.'' Respondent contends that it was not hostile toward the idea of its employees organizing and becoming represented. In fact, there is no evidence of unlawful conduct nor of expressions of animus prior to the mass layoff. Yet, the timing of the layoff—within 48 hours of the Track Side meeting—suggests that animus existed. ''Timing alone may suggest anti-union animus as a motivating factor in an employer's action.'' *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

The circumstances of the layoff on April 24 differed from those of prior layoffs. Although there had been past occasions when employees had been laid off for various periods, never before had employees been required to file employment applications to be considered for recall. Moreover, in contrast to past layoffs, before being allowed to resume employment, each employee was required to undergo an individual interview as a condition precedent to being rehired. And, as described below, the subject of those interviews did not pertain to diligence in working. Rather, as Gary Cell admitted, each employee was told to be satisfied with Respondent's employment terms, dissatisfaction with which had been the cause of their decision to meet with the Union.

Nor is it necessary to rely solely on circumstantial evidence to infer animus. In the course of disavowing its existence, Gary Cell claimed that there had been past rumors about employees contacting unions: ''it is a common thing that people would say 'Well, maybe we should start a union,' or maybe we should do that.'' In effect, claimed Cell, the situation in April had been no different than on prior occasions. Yet, in the course of that disavowal, Cell conceded that Respondent had been concerned about the rumors of possible unionization when they had initially surfaced: ''the first couple time you hear it you get concerned . . . .'' Consequently, Respondent was hardly so lacking in concern about unionization of its employees as Gary Cell attempted to portray.

To be sure, Cell continued his testimony about Respondent's reaction to those initial rumors by claiming that ''after a while it was so common that you just kind of 'smurfed' it off, or didn't say anything about it.'' However, the rumor that Cell admittedly heard on April 22 was quite different, so far as the evidence shows, from earlier rumors that he described having heard. Those earlier rumors had been no more than generalized expressions about a course of action that employees had wondered if they ''maybe . . . should'' pursue. In contrast, Cell conceded having heard in April that some of the employees actually were taking steps to organize by ''going up to the Track Side to talk about a union.'' The distinction is hardly an insignificant one. For, prior rumors involved only possible action, whereas the April one pertained to a concrete, specific course of conduct. As a result, the April rumor heard by Gary Cell was not so susceptible of being '''smurfed' off'' by Respondent. Indeed, it is a fair inference that the concern generated by initial rumors of generalized employee consideration of unionizing were resurrected by the April rumor of specific action being undertaken to actually organize and become represented.

The ultimate ''determination which the Board must make is one of fact—what was the *actual motive* of the discharge?'' *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). Of course, that ultimate determination is not satisfied simply by a prima facie showing of unlawful motivation. Yet, once such a showing has been made, the burden shifts to the employer to explain its ''*actual motive* of the discharge[.]'' Id. ''The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.'' *Inland Steel Co*., 257 NLRB 65 (1981).

Gary Cell was Respondent's principal—indeed, in most material respects, its only—witness concerning its motivation for laying off assembly plant employees on April 22, for not recalling Witte, Hackler, and Thomas at any time thereafter, and for granting wage increases to eight employees following their recall from layoff. He testified that there had been a work slowdown in the assembly plant that began occurring about a month before April 24. As a result, he testified, at a management meeting before lunchbreak on that date, a decision had been made to lay off all those employees and to rehire each one after an individual interview with a foreman. According to Gary Cell, ''the strategy behind laying the whole crew off and rehiring'' had been,

> first of all, we did have, it was an opportune time, because we were between the planters and the harvesters, and we were having problems getting our material in.
>
> Second of all, we wanted—what I wanted to do was put the foremens [sic] responsible for their departments, and basically they could interview the people, find out what the problems were, and hire them back if he wanted them back.

However, as he testified, Cell did not appear to be doing so candidly and a review of the record confirms that impression.

At various points Gary Cell gave testimony that tended to be more advantageous to Respondent's position—or, at least, less advantageous to that of the General Counsel—than earlier contradictory statements appearing in his prehearing affidavit. For example, he testified that he had been hearing rumors of a work slowdown since late March or early April, even before he went on vacation from April 8 through 15. But, his affidavit states, ''So maybe I heard this rumor [of a purported slowdown] as of Tuesday, April 23.'' To explain

that inconsistency, Cell claimed ''my dates were wrong on that'' when he had given the affidavit. However, such a facially plausible explanation was not available with regard to other inconsistencies between his testimony and his affidavit. By way of illustration, he testified that foremen had reported that a work slowdown was occurring, but, in an apparent effort to avoid conceding that he had known about employee dissatisfaction with employment terms, denied specifically that the foremen had also reported that employees felt that they were being mistreated: ''I did not hear that, no.'' Yet, that denial was contradicted flatly by his affidavit's statement that the foremen had ''said there was a lot of complaining about the company, about the way employees felt they were being mistreated, and about wages.'' Confronted with that prior statement, Cell retracted his testimonial denial and lamely conceded that, in fact, Respondent's foremen had reported that employees felt mistreated.

A similar inconsistency, as well as other troubling aspects, arose in connection with his description of the supposed prelunch management meeting of April 24. Asked if it were not true that, at that meeting, he had told the foremen that Witte, Hackler, and Thomas would not be returned from the layoff, Cell hedged, responding ''the one I did, the other two came from Rodney. Which I reinforced.'' However, so far as the evidence shows, Gary Cell made no mention of Rodney Gross, a welding foreman who is an admitted statutory supervisor and agent of Respondent, in his prehearing affidavit's account of decisions made at that meeting. Rather, the affidavit states that he (Gary Cell) had been the person at that meeting who had ''specifically told the foremen'' that Thomas, Witte, and Hackler would not be rehired. Furthermore, Gary Cell's testimony that these three employees had even been discussed during that meeting was expressly contradicted by Respondent's director of manufacturing, Stanford Harper, also an admitted statutory supervisor and agent of Respondent. For, with reference to that particular meeting, Harper testified that, ''None of the people going to discuss [sic] were discussed at that time,'' and that, ''Specific names were not brought up.''

That contradiction might have been explained by Harper's further testimony, developed during redirect examination, that he had not been present for the entirety of the April 24 prelunch management meeting. Yet, while Gary Cell testified that his father, Gordon, had attended that meeting, and although as shown on page 15 of the transcript, President Gordon Cell was present throughout the hearing, the latter was never called as a witness and, thus, did not confirm his son's description of what had been said during that meeting.

In fact, as a result of his nonappearance as a witness, a number of statements purportedly made to or by Gordon Cell were unconfirmed. Gary Cell claimed that he had been reprimanded by his father in late January or early February for not making the foremen do their job, assertedly as a result of Gordon Cell's discovery that Thomas had been visiting with other employees instead of working. Similarly, apparently in support of his testimony that he had actually discovered the slowdown prior to April 23, instead of on that date as stated in his affidavit, Gary Cell testified that during the afternoon of April 16 he had complained to his father that something had to be done about the slowdown ''or we will not get these machines out on time, and [the order for them] will be cancelled.'' In response, testified Gary Cell, his father had replied only that he did not know what to do: ''We were talking about getting the foremen together to see what we could do.''

In addition to Gordon Cell, no other supervisor confirmed Gary Cell's testimony that during the April 24 prelunch management meeting he had warned his father ''that if we didn't do something, we were not going to get the machines out that had to get out.'' Nor did the senior Cell or any other supervisor corroborate Gary Cell's assertion that, during that same meeting, his father had asked, ''would it help if I went down and talked to the people [about the slowdown].''

Gary Cell's testimony about what purportedly had been said at the April 24 prelunch management meeting is not his only account of a supposed incident that went uncorroborated by Respondent's supervisors. In an apparent further effort to buttress his testimony that he had learned of an asserted slowdown before April 23, Gary Cell testified that he had received a report before April 8 that employees were engaging in a slowdown and, in response to that report, two supervisors—Dan Helmbrecht and Stanford Harper—had each warned a different group of employees that anyone caught slowing down would be fired. Aside from the contrast between this supposedly affirmative response and the portrayal of bewilderment and uncertainty later in April concerning what should be done about the asserted slowdown, as described two paragraphs above, the most significant aspect of Cell's testimony about the purported pre-April 8 report and reaction to it is that no corroboration for it was provided. Neither Supervisor Helmbrecht nor Supervisor Harper confirmed any aspect of Gary Cell's testimony about it. Indeed, though Cell claimed that the report had been received from Curt Thomas, the latter was never called as a witness to corroborate having made such a report, although Respondent never represented that Thomas was unavailable to it for that purpose.

Ultimately, Respondent failed altogether to establish that, in fact, a slowdown had occurred in April or at any time before that. Interrogated specifically about work that should have been, but had not been, performed, Gary Cell testified that Respondent had orders for harvesters, but could not then manufacture them due to a steel shortage prior to the mass layoff. However, in contrast to his above-quoted testimony about being ''between the planters and the harvesters,'' he acknowledged that during the time that he had been on vacation, from April 8 through 15, Respondent ''basically'' had orders for ''a couple of planters that still had to get out.'' As quoted two paragraphs above, Gary Cell had purportedly warned his father during the April 24 prelunch management meeting that those machines would not be gotten out unless something was done about the asserted slowdown. In light of that testimony concerning a warning that supposedly precipitated the mass layoff, it came as somewhat of a surprise when Gary Cell admitted that one of the two planters had already been shipped before April 24: ''would have already [been] shipped, I'm sure, first part of that week [of the mass layoff].'' In this respect, Gary Cell acknowledged that Respondent possessed records that showed when those two planters had been shipped. However, Respondent never produced those records to show when each of those two planters had actually been shipped.

To be sure, leadman Rick Helmbrecht testified that in late April ''machines were not being built as fast as they possibly

could. There was a slacking up with a lot of the employees,'' which Helmbrecht attributed to a slowdown by them. At first blush, that testimony appears to confirm the account in Gary Cell's affidavit about purportedly learning of a slowdown on April 23. However, as described above, Cell testified that the asserted slowdown had been occurring since late March or early April. That testimony is not corroborated by Helmbrecht's assertion of a late April slowdown. Indeed, during cross-examination, Helmbrecht was asked specifically when the slowdown had begun. Although he claimed that ''[a]t first it was gradual,'' he eventually testified, ''I can't give you exact dates,'' and retreated to the generalized assertion that, ''I think that it was—people getting frustrated because they weren't getting no raises, and I think things started slowing down at that time because they felt they deserved more money.'' Yet, he conceded that employees had been frustrated at not getting raises as early as the preceding Christmas. However, at no point did Helmbrecht claim—and Respondent did not contend—that a slowdown had commenced as early as December 1990, nor during the succeeding 1 or 2 months. As a result, rather than providing confirmation for Respondent's slowdown defense, Helmbrecht's testimony only made it more suspect.

Nor was that the only respect in which Helmbrecht's testimony ultimately cast doubt on the reliability of Respondent's defense. During direct examination he claimed that occasionally Witte had ''said that in order to . . . get a raise, that the people at [Respondent] should slow down, that they couldn't fire everybody if they did.'' Of itself, such a statement constitutes no more than an opinion about a possible course of action; it does not necessarily constitute an expression of intent to pursue, nor actual advocacy of, a particular course of conduct.

That became even more plain during cross-examination when Helmbrecht described with greater particularity what he had supposedly overheard Witte saying:

> I was working on a machine and he was talking to somebody else and he says, ''You know, it should be the type of thing, all of us should slow down, because,'' he says, ''if we all did,'' he said, ''they couldn't fire us all. And they'd have to give us more money. They have to get the stuff done.''

Furthermore, despite his assertion during direct examination that Witte had ''[o]ccasionally'' made remarks about slowing down, that asserted remark was the lone particular instance provided by Helmbrecht of such a supposed comment by Witte, who credibly denied having made such a statement to coworkers. In fact, after first claiming that Witte had been the ''only one that made the remark,'' Helmbrecht then testified somewhat inconsistently that he had heard other, unidentified, employees saying ''maybe Scott's right, maybe a person should slow down. Maybe if we stuck together we could get an increase in wages.'' However, even if overheard by Helmbrecht, those remarks show no more than discussion of a possible course of action, not that the employees had adopted it as a course of action.

Respondent never plausibly explained exactly how a mass layoff would have promoted expeditious completion of work in progress. Gary Cell testified that he had taken advantage of that layoff to ''put the foremen totally responsible or tried to make them responsible for their departments, and I made them responsible for the employees under them, and their wages.'' Yet, at no point did Cell explain how such an objective could have been facilitated by a mass layoff, as opposed to simply telling the foremen what was expected of them while the employees worked to complete manufacturing the single harvester that remained to be manufactured.

Indeed, in testifying about the foremen's responsibilities, Gary Cell only further contradicted himself. For, after initially agreeing that he had given the foremen further authority at the time of the layoff, he later testified, ''They had always had [that authority] but they never took initiative of it. I made sure that they knew at that date they were going to be responsible for it.'' However, he never described exactly how he had communicated that message to the supervisors and no supervisor ever corroborated Cell's unparticularized testimony that he had done so. That is, there is no evidence whatsoever of any meeting between Gary Cell and the foremen at the time of the mass layoff at which the latter's authority, or exercise of it, had been discussed.

Finally, despite Respondent's supposed concern about a work slowdown, so far as the evidence discloses, no caution against slowing down was issued during any of the individual interviews conducted with employees who had filed employment applications, as directed on April 24. Instead, as Cell admitted in his prehearing affidavit, the foremen

> were to find out what the problems were, find out if [the applicants] really wanted to work here, let employees know that they had to be satisfied with the wage rate they were getting. If they were not satisfied, we were to let them know they shouldn't work here.

In other words, rather than concerning themselves with work output, as might be expected to have been the topic of those interviews had a slowdown actually occurred and had such a slowdown been the reason for the mass layoff, the foremen were supposed to ascertain the specific causes of the employees' dissatisfaction—the ones that had led to their meeting with the Union—and, then, to tell them to work somewhere else if they could not accept the existing situation.

In view of the foregoing considerations, I do not credit the evidence on which Respondent's defense is based and, as a result, Respondent has presented no credible explanation for the mass layoff that occurred within 2 days of the employees' meeting with the Union. Therefore, I conclude that a preponderance of the credible evidence establishes that the mass layoff of April 24 had been motivated by the employees' decision to contact the Union and authorize it to act as their bargaining agent—so that they might be able to improve employment terms with which they had been dissatisfied and which had remained uncorrected after earlier direct communications with Respondent—and to discourage their desire to become represented. Because of that unlawful motivation, Respondent violated Section 8(a)(3) and (1) of the Act by laying off its employees on April 24.

C. *The Refusal to Reinstate Witte, Thomas, and Hackler*

Aside from describing occasional generalized remarks about the desirability of slowing down work to persuade Respondent to correct working conditions perceived to be less than satisfactory, Gary Cell advanced a series of complaints

about Witte, Thomas, and Hackler. For example, Witte had an erratic attendance record, marred by unexcused absences, tardiness, and early departures from work, and, in addition, had been prone to visiting with other employees, instead of working steadily. With regard to Thomas, Gary Cell testified that Thomas had spent time visiting, instead of working, and had announced that he would not perform his job of welding frames unless paid more money. Finally, Cell testified that Hackler had refused to cut some parts when asked to do so by a foreman and, moreover, had not been working up to his full potential because he had said that he could operate a manual saw, as well as the automatic saw to which he was assigned, if he were to be paid more.

In contrast to Gary Cell's assertions in connection with the mass layoff, Respondent did provide evidence that corroborated some of his complaints about Witte, Thomas, and Hackler. At the end of January, Witte had received a written warning from Gross as a result of excessive absenteeism. And Gross testified that, when recalled from an earlier layoff in December 1990, Thomas had stated that he would no longer weld frames and, further, testified that he had spoken with Thomas about slowing down on the job. Moreover, Gross agreed with Gary Cell that he (Gross) had complained to Cell about Thomas and had recommended that the latter be laid off.

Nevertheless, as had been true with regard to the mass layoff, some of Gary Cell's testimony about the three unreinstated employees was not corroborated. Indeed, Cell seemed to be tailoring his testimony to overstate Respondent's dissatisfaction with Witte, Thomas, and Hackler. As described in subsection III,B, supra, Gordon Cell never corroborated his son's account of being reprimanded by the senior Cell in January after the latter assertedly had discovered Thomas visiting, instead of working. Similarly, no corroboration was provided for Gary Cell's testimony that, in January, Assembly Line Foreman Dan Helmbrecht had reported that Hackler refused to cut some parts when requested to do so by Helmbrecht.

In addition to lack of corroboration, there were certain other aspects of Respondent's defenses, concerning failure to reinstate these three employees, that raise suspicion about their reliability. After testifying during direct examination that ''when I hired [Thomas] back in December, he said he wasn't going to weld frames,'' during cross-examination Gross admitted that ''right around January'' Thomas had welded a frame for a four-row harvester, though not as expeditiously as Gross had wanted. Apparently perceiving that his testimony that Thomas had done so was not consistent with his earlier account of Thomas' purported December announcement of intent to no longer weld frames, Gross added that, after having welded that harvester, Thomas had ''said that [frame] was the last one he was going to weld.'' Yet, during direct examination Gross had made no mention of a second purported announcement by Thomas that he would not weld frames—of an additional one made after the announcement assertedly made in December 1990.

In another area, after January Witte had been absent without excuse on 2 days, had reported late for work once and had left work early on two occasions. Nevertheless, despite the attendance warning issued to him at the end of that month, Respondent did not discipline Witte for attendance deficiencies during February, March, or April. In fact, Respondent produced no evidence to show that an attendance record like Witte's was truly out of the ordinary for its employees over a 3-month period—no evidence that Witte's attendance from February through April 24 had been so different from that of other employees that it could be concluded objectively to have been relatively deficient.

Of course, ''Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in Respondent's position.'' (Citation omitted.) *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). But rather than operating to Respondent's advantage, that principle undermines Respondent's position in the circumstances of this case. For even had Witte, Thomas, and Hackler engaged in all of the misconduct attributed to them by Respondent's officials, not one of them had been terminated because of such conduct prior to April 24. Instead, Respondent continued to employ the three of them and, more significantly, Gary Cell effectively admitted that it would have continued to employ them had the mass layoff not occurred. Thus, he testified, ''what we do is we will have a layoff and instead of terminating people, we do not recall them.'' Indeed, he reinforced his description of that policy by testifying that when Gross had complained about Witte in January and February, ''I told him to, right now we had machines that had to get out the door, and I didn't care to terminate him, I would rather wait until we had a layoff and do it that way.'' In short, evaluated in the context of Respondent's own practice, had the mass layoff not occurred on April 24, Respondent would have continued to employ Witte, Thomas, and Hackler after that date, so far as the record discloses.

As concluded in subsection III,B, supra, the April 24 mass layoff had been unlawfully motivated and Respondent has failed to credibly show that it would have occurred absent the employees' effort to become represented by the Union. Since the severance of Witte, Thomas, and Hackler's employment was a direct and integral consequence of that unlawfully motivated mass layoff, and admittedly would not have occurred absent that layoff, and inasmuch as there is no evidence of a subsequent layoff which Respondent could have utilized to terminate one or more of them, I conclude that those three employees are entitled to reinstatement and that Respondent further violated the Act by failing to do so.

One additional incident arose in connection with Thomas. As it began to dawn on him that he would not be recalled from layoff, he telephoned Director of Manufacturing Harper at 1:33 a.m. on April 27. The two men had known each other for over a quarter century and, in effect, Thomas chastised Harper about the former's nonrecall. In the course of doing so, Harper testified, Thomas warned Harper to ''[w]atch your back.'' Thomas denied specifically having made that remark to Harper, but acknowledged having called Harper ''two-faced'' during their April 27 conversation. Yet, even had Thomas made the remark attributed to him by Harper, such a comment does not constitute a basis for barring reinstatement.

The conversation between Harper and Thomas occurred after the latter had begun to appreciate that he would not be recalled to work by Respondent. As concluded above, Respondent's refusal to recall Thomas had been unlawful and, in effect, Thomas was protesting Respondent's unfair labor practice. Moreover, a remark to ''watch your back'' is ambiguous. While Harper testified that he had regarded it as a

threat, there is no evidence that Thomas was considered to be, or in fact was, a violent individual. Following that conversation there was no further contact between the two men and Thomas never did anything else that could be construed as retaliatory conduct against Harper. In these circumstances, such a remark, if uttered, is no more than a spontaneous outburst that does not rise to the level of misconduct so severe that it warrants depriving a discriminatee of his statutory right to reinstatement.

D. *The Postmass Layoff Wage Increase*

As described in subsection III,A, supra, some of the recalled employees were awarded wage increases, with four of them being made retroactive to April 22 and the remaining ones becoming effective on April 29. In the final analysis, Respondent never really did explain either the reason(s) for granting those increases, nor the timing of them. Gary Cell claimed that a pay scale, with floor and ceiling rates, had been ''a thing that I had been working on before that. It was a project that I was working on with the State and the overall area to try to gather up what the average wages were in that area.'' Yet, no corroborating evidence was presented for that testimony and Cell gave no particularized account of whatever project he had purportedly been working on. Moreover, asked when the asserted pay scale had been established, Gary Cell responded, ''that went out some time in June.'' If so, he never explained the individual increases awarded over a month before that. Nor did he explain why some of these April increases had been made retroactive to April 22.

As described in preceding subsections, lack of wage increases and of a procedure to merit them had been major causes of dissatisfaction that had led employees to meet with the Union on April 22. Prior to the mass layoff, Respondent had consistently rebuffed requests for wage increases with the response that they could not be afforded. Indeed, if not precarious, Respondent's financial situation in April had not been secure. For Gary Cell admitted that delivery of steel for manufacturing harvesters had been withheld because ''we were on credit hold with our steel suppliers.'' Of course, steel had been received by the time that wage increases had been awarded in April. However, nothing in the record indicates that its delivery had inaugurated an era of financial plenty for Respondent and that it no longer confronted a tight financial situation.

In the circumstances, a preponderance of the evidence warrants the conclusion that the wage increases were no more than the carrot to the mass layoff's stick. The layoff served to warn employees of Respondent's control over their employment and to display its willingness to utilize that control to their detriment. The wage increases held out the prospect of resolution of their dissatisfaction and of ability to achieve improved employment terms without the need for a union. No specific statements were needed to communicate those messages. In the circumstances, they were clear. Therefore, I conclude that by granting wage increases to employees in late April, Respondent interfered with their Section 7 right to freely choose representation and violated Section 8(a)(1) of the Act.

E. *Requested Remedial Bargaining Order*

Respondent does not contest that as of April 24, when the first unfair labor practice—the mass layoff—occurred, a numerical majority of full-time and regular part-time production, fabrication, and maintenance employes employed in its assembly plant had signed cards authorizing the Union to represent them. Not only does the evidence show that to be the fact, but the record also discloses that the Union maintained the support of a numerical majority of those employees for at least the remainder of April.

Although Respondent does not challenge the existence of that numerical majority of cards in the assembly plant, it does raise several other objections to the General Counsel's argument that a bargaining order is necessary to adequately remedy unfair labor practices of the nature committed by it. First, it is undisputed that then-Machine Shop Foreman Stromberg had attended the April 22 parking lot meeting at the Track Side, where he signed an authorization card, and that he had voiced the opinion to employees, on other occasions that it would be a good idea for them to select a bargaining agent. Respondent contends that such conduct by a supervisor taints whatever support a union receives from employees. However, there is no evidence that Stromberg directly solicited employees' signatures on cards. Nor is there evidence that, as a result of Stromberg's expressions of union support, any assembly plant employees, especially any who had signed authorization cards, were placed in fear of retaliation by Stromberg for not supporting the Union and for not signing its authorization cards. Similarly, there is no evidence that anything said or done by Stromberg conveyed an express or implied message he was acting on behalf of Respondent and that Respondent wanted the employees to select the Union as their bargaining agent. Consequently, the fact that Stromberg had been a sympathetic supervisor—one sympathetic to the Union's efforts to organize Respondent's employees—does not, standing alone, taint support for representation demonstrated by the fact that a majority of assembly plant employees signed cards authorizing the Union to represent them. See, e.g., *Napili Shores Condominium v. NLRB*, 939 F.2d 717, 719 (9th Cir. 1991); *NLRB v. Wehrenberg Theatres v. NLRB*, 690 F.2d 159, 162 (8th Cir. 1982).

A more substantial challenge is raised by Respondent's argument that a unit confined to the assembly plant is too narrow in scope and that, to be appropriate, any unit of Respondent's Braham employees must encompass employees whose work location is the rubber plant. As briefly described in subsection III,A, supra, Respondent's operations at Braham are housed essentially in two plants, one denominated the assembly or main plant and the other referred to as the rubber plant. In addition, a spray booth is located approximately 50 yards from the assembly plant, but apparently the parties agree that employees from the assembly plant who work there regularly would be properly included in whatever unit encompassed other assembly plant employees. No independent argument challenging the scope of the unit is predicated on the existence of the spray booth.

Prior to November 1990, fiberglass operations were conducted in a shed located approximately 100 yards from the assembly plant. In approximately that month, due to cold

weather, those operations were relocated to the rubber plant. Although Gary Cell testified that the fiberglass operation ''will probably'' be restored to that shed, because ''[t]here's more room down at that particular location,'' he gave no testimony about any definite, or even tentative, plans to restore those operations there. So far as the record discloses, since November 1990 fiberglass operations have been conducted continuously in the rubber plant and, consequently, have been housed there at all times during the organizing campaign and while Respondent committed its unfair labor practices.

The hearing in this case occurred in the month of October and, accordingly, at a time when cold weather was again imminent, as it had been in 1990 when fiberglass operations had been relocated. Not only would restoration to the shed in 1991 pose the exact cold weather problem that it did in 1990, but that same weather problem would recur in each succeeding year. In short, absent additional evidence—which Respondent did not present—there is no basis for concluding that there is any substance to Gary Cell's speculation that fiberglass operations ''will probably'' be restored to the shed. So far as the specific reliable evidence discloses, the fiberglass operations should be included as part of the rubber plant. Therefore, neither its prior shed location, nor for that matter the existence of a detached spray booth, affects the unit issue of whether a single assembly plant unit is appropriate or, alternatively, whether no unit smaller in scope than an employerwide, two-plant unit can be appropriate.

''There is a presumption that a single plant is an appropriate bargaining unit.'' *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1014 (9th Cir. 1981). However, that presumption can be rebutted by evidence that ''such plant unit has been so effectively merged into a more comprehensive unit by a bargaining history, or is so integrated with another as to negate its identity.'' *Dixie Belle Mills*, 139 NLRB 629, 631 (1962). Concerning the first of those two rebutting alternatives, as described in subsection III,A, supra, prior to 1990 all employees at Braham had been represented in an overall, employerwide unit, embracing both the assembly and rubber plants. Yet, the reason for according weight to bargaining history is rooted in the policy of not departing from established bargaining relationships. *Dezcon, Inc*., 295 NLRB 109, 112 fn. 13 (1989). Here, there has been no bargaining history since before January 1990—more than a year prior to the Union's organizing campaign and Respondent's unfair labor practices arising as a result of that campaign. Since then, there has been no established bargaining relationship to be disrupted. Accordingly, less weight should be accorded to so relatively remote a history of bargaining, *Hall's Super Duper*, 281 NLRB 1116, 1118 (1986), especially where, as here, a different employer operates the facility and a different labor organization seeks to represent only some of the formerly represented employees.

With regard to functional integration, the record shows a close geographic proximity between the two plants. Only approximately a quarter mile separates the rubber plant from the assembly plant. While geographic proximity of plants is a factor in making determinations as to the appropriateness of single plant units, it is not the determinative factor. Indeed, the Board has concluded that a single plant unit was appropriate even though it was only 500 feet from another plant operated by the same employer. *Gordon Mills*, 143 NLRB 771 (1963).

Not only is there a quarter mile between the two plants, but each one has a separate address. More significantly, while the record is not altogether clear on the subject, it appears that a fence separates the two plants. Thus, in describing movement of subassemblies to the rubber plant from the assembly plant, Gary Cell testified that they are hauled by vehicle to the rubber plant where they are dropped ''inside the gate on one side.'' And in the course of describing the shed in which fiberglass operations had been located prior to November 1990, he testified that the shed is ''about 100 yards from the main plant, but inside the fenced-in area.'' In these circumstances, the geographic proximity of the assembly and rubber plants is not so facially persuasive a factor in favor of functional integration as might be the fact in other contexts.

Perhaps Respondent's strongest argument attempting to rebut the single plant unit presumption is the integration of product between the two plants. No product shipped by it from Braham has not been worked on, at some point while being manufactured, by employees in both plants. For example, rollers made and welded in the assembly plant are then rubber coated in the rubber plant, after which they are returned to the assembly plant for incorporation into the machines manufactured and sold by Respondent. Cup hoppers and cup shoots used to hold seeds, as well as fertilizers, are fiberglassed in the rubber plant before being incorporated by assembly plant employees into the planters shipped to customers. Similarly, harvester rods stored at the rubber plant are rubber-coated and riveted together there and, then, are taken to the other plant for assembly as part of the completed harvesters. Yet, while this evidence shows product integration between the rubber and assembly plants, and thereby is an indicia favoring a two-plant unit, that factor is not necessarily determinative. See, e.g., *Black & Decker Mfg. Co*., 147 NLRB 825, 828 (1964). Rather, product integration is but one of a number of factors that must be evaluated to make an ultimate determination of whether assembly plant employees possess a separate community of interest: whether they ''form a homogeneous, identifiable, and distinct group, physically separated from the employees [in the rubber plant].'' *Haag Drug Co*., 169 NLRB 877, 877–878 (1968).

Here there is evidence of centralized administration of operations at the two plants: Gordon and Gary Cell formulate policies that are uniformly applicable to employees working at both plants and, further, uniform wage ranges and benefits are applied to employees at both plants. Yet, there is separate, intermediate, and immediate supervision of employees at each plant. Harper is in charge of operations at the assembly plant and General Manager Kermit Grundberg is in charge of rubber plant operations. Reporting to Harper are foremen, such as Gross and Stromberg, who directly supervise assembly plant employees. Similarly, direct supervision of rubber plant press operators and millers is provided by Steve Gutzkow, and was provided by John Fredlund during the first 4 months of 1991, who reports directly to Grundberg. Although Gary Cell testified that he and his father make final decisions regarding hiring and firing of employees for both plants, he later conceded that for the assembly plant Harper, like Grundberg for the rubber plant, ''hires, lays off and [recommends] wage increases,'' as well as dis-

ciplines employees working there. In fact, as described in subsection III,B, supra, Gary Cell admitted that, at the time of the mass layoffs, it had been Respondent's policy that foremen, the employees' immediate supervisors, should be ''totally responsible . . . for the employees under them, and their wages.'' Consequently, Respondent's centralized administration has not left the separate intermediate and immediate supervision of each plant ''totally bereft of discretion in personnel matters.'' *Spring City Knitting Co. v. NLRB*, supra.

In that same case the Ninth Circuit pointed out that ''a relatively low degree of actual employee interchange among different plants [is] a strong indication that there is no collective 'community of interests' among a proposed multi-plant bargaining unit.'' Id. at 1015. Gary Cell claimed that, ''if the rubber plant ends up being a little slow, before we lay the people off there, we will see if we could use them up at the main plant.'' Yet, accepting arguendo that such instances of temporary transfer from the rubber plant to the assembly plant may have occurred, Respondent has presented no evidence that it did so other than on isolated occasions. And, in fact, no evidence of even a single particularized example of such a temporary transfer has been presented by Respondent to support the generalized assertion of such a temporary transfer practice. Nor was even an assertion advanced of temporary transfers in the other direction: from the assembly plant to the rubber plant. Furthermore, there is no evidence showing that there have been any permanent transfers between the two plants, except, of course, to the extent that relocation of the fiberglass operations from the detached shed near the assembly plant might be regarded as a permanent transfer. But that was a one-time incident and there is no evidence of any other relocations. Consequently, there is no evidence of significant temporary or permanent interchange between the assembly and rubber plants.

To be sure, there is some evidence of daily contacts between the plants, since subassemblies are transported to the rubber plant for coating and are transported from the rubber plant to the assembly plant for incorporation into planters and harvesters. In addition, shipping and receiving for both plants is located at the assembly plant and, after being received at the main plant, materials are transported to the rubber plant. However, movement of subassemblies and material between Respondent's plants does not indicate that there are daily contacts between the two plants' employees. For, Gary Cell testified that forklift or pickup truck operators going to the rubber plant would deliver their loads, ''[n]ormally inside the gate on the one side,'' and that subassemblies would be picked up ''normally . . . at the same place'' from the rubber plant. At no point did Cell, or any other supervisor, claim that there was actual contact between my rubber plant employees and the forklift or pickup truck operator who delivered to or picked up from the rubber plant. Cell did testify that ''sometimes [forklift or pickup truck operators] will have to go in [to the rubber plant] and get [subassemblies] themselves.'' However, Cell did not claim that such instances occurred with any frequency and, so far as other evidence discloses, they do not occur with any regularity.

Cell further testified that fiberglass operations employees regularly travel to the assembly plant to use the paint facilities located there. Yet, aside from the unreliability of Cell's testimony generally, there is no evidence as to how many fiberglass employees do so. Nor is there particularized evidence as to how frequently fiberglass employees use the assembly plant's paint facilities and as to how long they spend in those facilities whenever they use them. More significantly, there is no evidence whatsoever that fiberglass operations employees encounter—have contact with—any assembly plant employees while using the paint facilities in the assembly plant.

Not only is there an absence of direct evidence of any significant contacts between employees of the two plants, but there is no basis for inferring its existence. Each plant has its own timeclock used to punch in and out by employees working in that particular plant. Rubber plant employees primarily perform their work utilizing compression presses and a plastisaw machine, which Gary Cell admitted are machines that are not like any of the ones in the assembly plant. Instead, the large machines in the assembly plant are used to perform heavy metal operations and there is no evidence that such operations are conducted at the rubber plant.

No doubt an employerwide, two-plant unit is appropriate. It may even be an objectively better unit than a single-plant one encompassing only assembly plant employees. However, ''[i]t is not required by the Act to choose the most appropriate unit, but only to choose an appropriate unit within the range of several appropriate units in a given factual situation.'' *State Farm Mutual Automobile Insurance Co. v. NLRB*, 411 F.2d 356, 358 (7th Cir. 1969).

The assembly plant employees are separately housed in a plant that has a separate address and that is separated by a fence from the rubber plant. Distinct operations are performed in each of those plants by employees who use different types of machinery to perform them. Employees in each plant are subject to separate immediate and intermediate supervision. There is no reliable or particularized evidence of any significant temporary or permanent employee interchange between the two plants. At best, there is evidence of only minimal and relatively infrequent daily contact between a seemingly few employees who work at the assembly plant and some of those assigned to work in the rubber plant. These factors serve to outweigh any common interest between employees at the two plants arising from simple geographic proximity, product integration, and centralized administration and, furthermore, support the presumptive appropriateness of assembly plant employees as ''a homogeneous, identifiable, and distinct group,'' *Haag Drug Co*., supra, possessing a community of interest separate and distinct from that of employees working in the rubber plant. Therefore, I conclude that a unit of assembly plant employees is an appropriate unit within the meaning of Section 9(b) of the Act.

That Respondent committed serious and substantial unfair labor practices in April can hardly be disputed. It laid off every unit employee. Indeed, while that action has been characterized as a layoff, from the employees' perspective it might equally be characterized as a mass discharge and as a temporary plant closure. For, each laid-off employee was required to file an employment application to be eligible to consideration for renewed employment by Respondent. Moreover, as described in subsection III,B, supra, no employee was eligible for reemployment if unwilling to acknowledge satisfaction with existing wage levels and employment conditions. Of course, it had been dissatisfaction with employment terms that had led to employees to meet with the Union and to sign cards authorizing it to represent

them. As a result, not only did Respondent send an implied message that it would not tolerate unionization, when it laid off all assembly plant employees within 48 hours of their first union meeting, but it explicitly told every employee being interviewed that they must cease being dissatisfied with employment conditions if they wanted to resume working for Respondent: in short, be satisfied or begone. Thereafter, certain of those employees received wage increases, implicitly demonstrating that an alternative to unionization was available as a means for improving conditions with which the assembly plant employees had been dissatisfied. Of course, that alternative had not been made available before the Union's arrival on the scene.

Not only were Respondent's unfair labor practices serious and substantial ones, and not only did the layoff affect every one of the assembly plant employees, but they were committed as a result of a meeting attended by all Respondent's officials: president, vice president of operations, director of manufacturing, and foremen. Save possibly for one or more assembly plant foremen, not all of whom were necessarily identified during the hearing, the record shows that all those individuals still occupy their positions, particularly Gordon and Gary Cell. There has been no showing that those two highest ranking officials have experienced any change in the attitude that led them to authorize and implement the unlawfully motivated layoffs, reemploy only employees who were willing to be satisfied with existing employment terms, and grant selective wage increases as a means of further discouraging employee support for representation. Nor is there any evidence that would support a conclusion that Respondent would be less likely to resort to unfair labor practices should support for representation again surface, though perhaps by traveling a more subtle avenue.

In effect, Respondent attempts to refute that conclusion by pointing out that, prior to cancellation of a representation election pursuant to the blocking charge doctrine, it had launched no campaign whatsoever against the Union. Yet, it did not need to do so. By the nature of its unfair labor practices, it already had conducted the most effective of antiunion campaigns. The memory of having been laid off and forced to reapply for employment, as new employees, is one that would linger without the necessity for subsequent reinforcement of Respondent's position. It also is a memory giving rise to a reputation about Respondent's attitude that would not likely be erased by traditional Board remedies, especially as Respondent has not reinstated three of the unlawfully laid-off employees. In view of these considerations, I conclude that the rights of employees, and their desires reflected by the majority's execution of cards authorizing the Union to service as their bargaining agent, will be better protected by issuance of a bargaining order.

Respondent, however, points out that it is unfair to impose such a remedy in light of its high rate of employee turnover—according to Gary Cell, over two-thirds of employees hired by Respondent do not remain employed by it—and in view of two post-June 20 petitions signed by a substantial number, perhaps a majority, of the two plants' employees declaring, in effect, that they did not desire representation by the Union absent an election. However, those petitions, circulated approximately 2 months after Respondent's employees had been subjected to serious unfair labor practices, were signed in a lingering atmosphere of unremedied unlawful conduct intended to coerce employees into abandoning support of the Union as their bargaining agent. In light of that continuing atmosphere of unremedied unfair labor practices, it comes as no surprise that employees would sign those petitions. In those circumstances, their signatures on them can hardly be accorded weight as evidence of the uncoerced desires of Respondent's employees concerning representation.

To accept Respondent's turnover argument would be to allow it to use its employees as footstools to straddle both sides of the question of employees' desires. That is, on the one side, as concluded above, in April it manipulated those desires by engaging in conduct designed to coerce the attitudes of those employees against representation. Now it takes the other side, displaying solicitude for employee desires and arguing that, in fashioning a remedy of those unfair labor practices, the Board should be concerned about those desires. Of course, blind acceptance of that latter side has the effect of enhancing Respondent's ability to accomplish the very object that, as concluded above, it set out to accomplish when it engaged in unlawful conduct in April to coerce employees into reversing the desire for representation displayed by a majority of them.

In point of fact, turnover resulting from passage of time is not the compelling analytical factor under the Act that is now sought to be portrayed. A certification of representative, resulting from employee choice of a bargaining agent in a Board-conducted election, is not later revoked simply whenever turnover may result in an employee complement that may not have voted for representation had it been the one employed on the election date. Similarly, an employer is not free to withdraw recognition, voluntarily granted earlier on the basis of authorization cards signed by a majority of a unit's employees, simply because turnover has led to replacement of most or all of the employees who had signed those cards. Consequently, while turnover is not a completely meaningless factor in every possible situation, ''where an employer engaged in conduct, disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969). Obviously, time will pass as an inherent consequence of the litigation process needed to reach such a determination regarding an employer's conduct. Yet, to allow turnover during that passage of time, standing alone, to defeat ''the most effective—perhaps the only—way of assuring employee choice'' would be to twice victimize coerced employees: once when they were subjected to serious unfair labor practices and, later, when a once freely made choice is disregarded simply because of the time needed to determine that their employer had engaged in unlawful conduct.

Here, as concluded above, Respondent committed the most serious of unfair labor practices. One of the effects of their commission is to create a reputation for Respondent as an antiunion employer and as one perfectly willing to resort to unlawful conduct in support of its antiunionism. That reputation, as is true of any other type of reputation, will likely remain with the community—in the instance, the Braham worksite—in which it arose. That is, Respondent's reputation will likely linger in the memories of employees who remain employed by Respondent after having been subjected to those unfair labor practices. Further, it will become known by, and part of the memory of, subsequently hired employ-

ees, given the normal course of human conduct in communicating previous workplace events to employees as they join the employee complement of a particular employer. In these circumstances, Respondent's reputation, and the substantial unlawful conduct that gave rise to it, will likely be perpetuated despite the occurrence of employee turnover, especially as Respondent continues to be owned and supervised by the same officials who authorized and committed those unlawful actions. Therefore, neither the post-June 20 petitions nor the turnover after April serve to eliminate the need for a bargaining order to remedy the effects of Respondent's unfair labor practices and to assure employee free choice.

CONCLUSION OF LAW

Cell Agricultural Manufacturing Company has committed unfair labor practices affecting commerce by laying off 31 employees on April 24, 1991, and by refusing to thereafter reinstate 3 of them, in violation of Section 8(a)(3) and (1) of the Act, and by granting wage increases to employees to undermine employee support for representation, in violation of Section 8(a)(1) of the Act. Those unfair labor practices are so serious and substantial in character that the possibility of erasing their effects through traditional remedies and of conducting a fair election is slight, with the result that employee sentiment regarding representation is better determined by relying on authorization cards signed by a majority of assembly plant employees and with the added result that employee rights are better protected by issuance of a bargaining order than solely by traditional remedies.

REMEDY

Having concluded that Cell Agricultural Manufacturing Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer to Scott Allen Witte, Gary Hackler, and Alvin Thomas immediate and full reinstatement to the positions from which they were laid off on April 24, 1991, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which they were laid off. If any of their positions no longer exists it shall be ordered to reinstate Witte, Hackler, or Thomas to a substantially equivalent position, without prejudice to seniority or other rights and privileges. It shall also be ordered to make whole all employees laid off on April 24, 1991, for any loss of pay and benefits suffered because of that unlawful layoff, with backpay to be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, for the reasons set forth in subsection III,E, supra, Cell Agricultural Manufacturing Company shall be ordered to bargain with Sheet Metal Workers International Association, Local 10, AFL–CIO as the representative of employees in an appropriate bargaining unit of all full-time and regular part-time production, fabrication, and maintenance employees employed at Cell Agricultural's Braham, Minnesota assembly or main plaint; excluding employees of the rubber plant, office clerical employees, guards and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Cell Agricultural Manufacturing Company, Braham, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against Donald E. Almlie, James W. Brown, Marlin Carlson, James D. Drabant, Curtis L. Dunkley, Edward E. Dunkley, Joseph Dunkley, Thomas O. Falls, Gene Goldbloom, John F. Holmer, Steven C. Johnson, Roger Kunz, Ronald Lundeen, Wallace Mayer, Frank Moore, Bruce Nelson, Troy D. Paxton, Mark G. Porter, Gaylord Rennaker, Walter E. Robbins, Russell E. Thomas, Todd J. Timm, Edward Vanderheyden, Joseph M. Wolf Jr., Dan Thomas, Michael Ovsak, Alvin Thomas, Kenny Johnson, Jim Simon, Gary Hackler, and Scott Allen Witte because of union activity.

(b) Granting wage increases to employees to discourage them from engaging in union or other activity protected by the National Labor Relations Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with Sheet Metal Workers International Association, Local 10, AFL–CIO as the bargaining agent for the employees in the appropriate bargaining unit described below, and embody any agreement reached in a written contract. The appropriate bargaining unit is:

> All full-time and regular part-time production, fabrication and maintenance employees employed at the assembly or main plant of Cell Agricultural Manufacturing Company in Braham, Minnesota; excluding employees of the rubber plant, office clerical employees, guards and supervisors as defined in the Act.

(b) Offer Scott Allen Witte, Gary Hackler, and Alvin Thomas immediate and full reinstatement to the positions from which they were laid off on April 24, 1991, or, if any of their positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Witte, Hackler, Thomas, Donald E. Almlie, James W. Brown, Marlin Carlson, James D. Drabant, Curtis L. Dunkley, Edward E. Dunkley, Joseph Dunkley, Thomas O. Falls, Gene Goldbloom, John F. Holmer, Steven C. Johnson, Roger Kunz, Ronald Lundeen, Wallace Mayer, Frank Moore, Bruce Nelson, Troy D. Paxton, Mark G. Porter, Gaylord Rennaker, Walter E. Robbins, Russell E. Thomas, Todd J. Timm, Edward Vanderheyden, Joseph M. Wolf Jr., Dan Thomas, Michael Ovsak, Kenny Johnson, and Jim Simon for any loss of pay and benefits they may have suffered as a result of their un-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

lawfully motivated layoffs on April 24, 1991, in the manner set forth above in the remedy section of this decision.

(c) Preserve and make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute the backpay and reinstatement rights as set forth in the remedy section of this decision.

(d) Post at its Braham, Minnesota facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Cell Agricultural Manufacturing Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that those notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, discharge, or otherwise discriminate against Donald E. Almlie, James W. Brown, Marlin Carlson, James D. Drabant, Curtis L. Dunkley, Edward E. Dunkley, Joseph Dunkley, Thomas O. Falls, Gene Goldbloom, John F. Holmer, Steven C. Johnson, Roger Kunz, Ronald Lundeen, Wallace Mayer, Frank Moore, Bruce Nelson, Troy D. Paxton, Mark G. Porter, Gaylord Rennaker, Walter E. Robbins, Russell E. Thomas, Todd J. Timm, Edward Vanderheyden, Joseph M. Wolf Jr., Dan Thomas, Michael Ovsak, Alvin Thomas, Kenny Johnson, Jim Simon, Gary Hackler, and Scott Allen Witte because of union activity.

WE WILL NOT grant wage increases to employees to discourage them from engaging in activity on behalf of Sheet Metal Workers International Association, Local 10, AFL–CIO or any other labor organization, nor from engaging in any other activity protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with Sheet Metal Workers International Association, Local 10, AFL–CIO as the bargaining agent for our employees in the appropriate bargaining unit described below, and embody any agreement reached in a written contract. The appropriate bargaining unit is:

> All full-time and regular part-time production, fabrication and maintenance employees employed at the assembly or main plant of Cell Agricultural Manufacturing Company in Braham, Minnesota; excluding employees of the rubber plant, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Scott Allen Witte, Gary Hackler, and Alvin Thomas immediate and full reinstatement to the positions from which they were laid off on April 24, 1991, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which they had been performing prior to April 24, 1991, or, if any of their positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and WE WILL make whole Witte, Hackler, Thomas, Donald E. Almlie, James W. Brown, Marlin Carlson, James D. Drabant, Curtis L. Dunkley, Edward E. Dunkley, Joseph Dunkley, Thomas O. Falls, Gene Goldbloom, John F. Holmer, Steven C. Johnson, Roger Kunz, Ronald Lundeen, Wallace Mayer, Frank Moore, Bruce Nelson, Troy D. Paxton, Mark G. Porter, Gaylord Rennaker, Walter E. Robbins, Russell E. Thomas, Todd J. Timm, Edward Vanderheyden, Joseph M. Wolf Jr., Dan Thomas, Michael Ovsak, Kenny Johnson, and Jim Simon for any loss of pay and benefits they may have suffered as a result of their unlawfully motivated layoffs on April 24, 1991, with interest on the amounts owing.

CELL AGRICULTURAL MANUFACTURING COMPANY